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No. 82-1430

In the Supreme Court

OF THE

United States

CHARLES ZOSLAW AND JANE ZOSLAW,
Petitioners,

vs.

MCA DISTRIBUTING CORP.;
DOUG ROBERTSON ADVERTISING, INC.;
MTS, Inc.; TOWER ENTERPRISES, INC.;
WARNER/ELEKTRA/ATLANTIC CORP.;
ABC RECORDS, INC.;
POLYGRAM DISTRIBUTION, INC.;
CAPITOL RECORDS, INC.; AND
CAPITOL INDUSTRIES-EMI, INC.,
Respondents.

Brief of Warner/Elektra/Atlantic Distributing Corporation, ABC Records, Inc., MCA Distributing Corporation and Polygram Distribution, Inc. in Opposition to the Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. When (a) the District Court grants summary judgment on two independent grounds, (b) the Court of Appeals affirms on both grounds, either of which is a sufficient basis for affirming the district court, and (c) Petitioners only seek a writ as to one ground, is a writ proper since there is an unchallenged basis for the ruling below?

2. Is Supreme Court review necessary for a fact specific conspiracy case where there is no issue respecting the controlling principle of law?

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Brief of Warner/Elektra/Atlantic Distributing Corporation, ABC Records, Inc., MCA Distributing Corporation and Polygram Distribution, Inc. in Opposition to the Petition for Writ of Certiorari

Respondents Warner/Elektra/Atlantic Distributing Corporation ("WEA"), ABC Records, Inc. ("ABC"), MCA Distributing Corporation ("MCA") and Polygram Distribution, Inc. ("Polygram") submit this Brief in Opposition only as to questions 1 and 4 in the Petition (the § 1 Sherman Act claims). Petitioners' questions 2 and 3 relate to claims by Petitioners against other defendants below and do not affect Respondents.

I

STATUTES INVOLVED

As to Respondents, the statutory provisions are § 1 of the Sherman Act, 15 U.S.C. § 1 and § 15 of the Clayton Act, 15 U.S.C. § 15.

II

CONCISE STATEMENT OF CASE

A. Nature of the Case

Petitioners Charles and Jane Zoslaw, dba Marin Music Centre, filed this action in 1975 alleging violations of the Sherman Act and the Robinson-Patman Act by Respondents and other distributors and retailers of phonograph records and tapes. Petitioners, with no prior experience in retail sales of phonograph records or pre-recorded tapes, opened Marin Music Centre ("Marin Music") in Mill Valley, California in 1965. Marin Music remained in operation until 1977 at which time Petitioners left the business because of their inability to meet the vigorous price competition in Marin County.

Petitioners initially alleged that Respondents violated Sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act by granting some San Francisco bay area retail record and tape outlets more favorable prices, credit terms, and advertising arrangements than those granted to Petitioners.

Petitioners' Sherman Act claims against Respondents, although based on precisely the same conduct, are not as straightforward. Petitioners advanced two basic theories of Sherman Act liability:

1. The "Overall Conspiracy" Theory

Each Respondent allegedly conspired with all other defendants, both distributors and retailers, to "fix the market" by selecting certain chain retailers to control and monopolize the retailing of records and tapes, and discriminating in favor of the selected retailers.

2. The "Vertical Conspiracy" Theory

Each Respondent allegedly entered into separate, two-party vertical combinations (the contracts between each Respondent and its customers) with each named retailer which caused discriminations in the sale of records.

B. Statement of Prior Proceedings

In January, 1975, Petitioners filed this action. They subsequently filed three amended complaints adding various defendants and factual contentions. As amended, the complaint stated various claims against Respondents (who are record distributors), six other record distributors, three record retailers, and an advertising agency.

Petitioners' initial claim against Respondents and the other distributor defendants was for violation of § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) alleging discriminatory pricing in favor of retail chain stores, and violations of §§ 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d) and 13(e), alleging discriminatory promotional allowances and special services.

On June 21, 1976, Petitioners' Robinson-Patman claims were dismissed on jurisdictional grounds.[1] In an attempt to resurrect their failed discrimination claims, Petitioners

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[1]This dismissal has since been reversed and remanded to the District Court for further proceedings.

commenced prosecuting their discrimination claims under the guise of a § 1 Sherman Act claim.

After several years of discovery, the district court granted Respondents' summary judgment motions on the Sherman Act claim for two separate reasons:

1. Petitioners "regularly and systematically violated Rule 56 of the Federal Rules of Civil Procedure" by submitting hundreds of unorganized, unauthenticated documents which "often failed to support the factual inference for which they had been provided." See Petitioners' Appendix A-8, A-34; B-12, B-18;[2] and

2. Respondents "clearly met their burden of proof" under Rule 56 of the Federal Rules of Civil Procedure by showing "the absence of a genuine issue as to any material fact," and Petitioners' Opposition, even when all evidence was construed, and all inferences were drawn, in the light most favorable to Petitioners, "failed to controvert defendant's showing. [Petitioners] have not produced any competent evidence from which it could be inferred that the alleged violations occurred." See Petitioners' Appendix B-19.

The Ninth Circuit Court of Appeals affirmed the judgment of the district court on both grounds.

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[2]For purposes of brevity, we refer here to the Appendices attached to the Petition.

C. Statement of Facts[3]

1. Marin Music Centre and the Marin County Market

Notwithstanding Petitioners' extensive, confusing and unsupported "Statement of the Case", the facts remain straightforward and largely uncontroverted.

Petitioners' single retail outlet experienced startup losses in 1965 and 1966, but claimed to have a profit for the following two years. Thereafter, due to increased competition from other retailers, the store again encountered financial difficulties, suffering losses from at least 1971 until it went out of business in 1977. See Petitioners' Appendix A-3.

During the time Petitioners were in business, the Marin County record market changed dramatically. Several other retail record and tape stores opened in the area and the number of department stores, grocery stores and drug stores with record departments also increased. Petitioners readily admitted that their store suffered losses because other stores sold records at a lower price. Simply put, Petitioners were unable to meet the vigorous price competition in the retail record business. See Petitioners' Appendix A-3, 4.

2. Synopsis of Facts Relating to Respondents

Respondents are all distributors of records and tapes, and each distribute records and tapes to retail customers and subdistributors in the San Francisco bay area, includ-

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[3]Petitioners' "Concise Statement of the Case" is 40 pages long and contains numerous conclusory allegations unsupported by the record. Given the space limitations on this Opposition, Respondents will not attempt to refute each of these misstatements individually.

ing up until it closed, Petitioners. Each Respondent did business with Petitioners on the same basis that it did business with other retailers similarly situated.

Respondents' pricing systems resemble one another insofar as they distinguished in price according to the function performed by the purchaser. That, however, is where the similarity ends.

The focal point of Petitioners' conspiracy allegations is that Respondents agreed with each other, and with other distributors and/or retailers regarding prices and account classifications. Petitioners presented no direct proof of such a conspiracy, and each Respondent denied these allegations in the trial court by way of sworn affidavits establishing that each Respondent made its pricing decisions unilaterally, and without consulting or agreeing with any other distributor. Each Respondent's decision was based on its independent assessment of competitive systems, its own cost efficiencies and its own costs. See Petitioners' Appendix A-38. Indeed, the wide diversity of cost classifications and "exceptions" shown in this record belie any conspiratorial conduct.

For example, Respondent WEA made the unilateral decision to adopt a two-level pricing system, based upon the necessity to meet the prices offered by its competitors and upon the belief that certain cost efficiencies could be realized through using subdistributors. While other distributors' systems were similar, they were far from identical. Respondent WEA's system varied significantly from those of its competitors, including in some instances the number of "tiers" or levels of functional distinction.

Similarly, the advertising decisions of each Respondent were reached independently. The primary factor in allocating advertising funds is the desire to achieve the greatest sales return on advertising expenditures. Each Respondent established below that it attempted to allocate advertising fairly among those purchasers requesting such funds. In fact, Petitioners received more than their share of advertising funds from Respondent WEA as a proportion of sales.

Finally, all of Respondents' credit policies and decisions were arrived at independently. Respondents never agreed with anyone on the terms of credit that would be extended to Petitioners or the allegedly favored retailers. While not all of the retailer defendants received the same credit terms, this is unsurprising. The retailers named in this action vary from state-wide chains with "at least 100 outlets," to single store locations.

3. Petitioners' "Proof" of Their Claims Against Respondents

(a) The "Overall Conspiracy"

Respondents' affidavits in support of summary judgment all denied any "overall conspiracy", and Petitioners presented no direct evidence of conspiracy. As the Court of Appeals noted, Petitioners' "only chance depended on their presentation of circumstantial evidence sufficient to support the inference of a 'conscious parallelism' conspiracy theory and on such further inferences as [Petitioners] might be able to draw from trade association and credit managers' meetings among the various distributors." See Petitioners' Appendix A-36.

With respect to the conscious parallelism proof, both courts below ruled that:

—Petitioners failed to raise any issue of material fact as to whether or not there was sufficiently similar behavior among the defendants to invoke the doctrine of conscious parallelism (following *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963)). See Petitioners' Appendix A-36-37; B-29-31;

—Even if parallel business behavior had been proved, Petitioners did not demonstrate the existence of any action against the independent economic self-interest of any Respondent, the requisite "plus factor" (following *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41; *Syufy Enterprises v. National General Theatres, Inc.*, 575 F.2d 233, 236. (9th Cir. 1978), *cert. denied*, 439 U.S. 954 (1978); *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971)). See Petitioners' Appendix A-37-39; B-31-32;

—Petitioners' conscious parallelism claim was "deficient because it never established a plausible motivation" for the alleged conspiracy (following *First National Bank v. Cities Service Co.*, 391 U.S. 253, 287 (1968); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975)). See Petitioners' Appendix A-39-41; B-32.

With regard to the trade and credit manager association meetings, the Ninth Circuit followed *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 575 (1925) in ruling that, "in the absence of any indication of

agreement or consent to an illegal arrangement, [evidence which Petitioners had no hope of providing here] evidence of industry meetings is not sufficient to prove a conspiracy." See Petitioners' Appendix A-41.

(b) The "Vertical Conspiracy"

As the sole basis for its "vertical conspiracy" claims, Petitioners pointed to the two-party sales arrangements between individual distributors and individual retailers. Petitioners claimed that these arrangements "caused discrimination in the sale of phonograph records and tapes to the named retail chain stores." However, Petitioners raised no genuine issue of material fact that any such arrangement was intended to or had the effect of excluding retail competitors from the market, and all the evidence—including Petitioners' own admission—showed that the retail market was extremely competitive and probably had benefited by the alleged discrimination.

III

REASONS FOR DENYING WRIT

A. Overview

There is nothing worthy of certiorari in this case. The rulings of both courts below (and, for that matter, the Petition itself), make it clear that (1) this is a fact specific controversy; (2) there is no conflict between this decision and any decision of this Court or any other circuit; (3) this controversy mainly affects the litigants and does not present issues of national importance which require review by this Court. See Rule 17 of the Rules of the Supreme Court of the United States. Moreover, both courts below made rulings which are not challenged by Petitioners

—rulings which make the decisions below correct without regard for the questions sought to be raised by the petition. Thus, the Supreme Court would be unlikely to reach the point of alleged importance.

This is a perfect example of Petitioner preying on the reluctance of courts to grant summary judgment in antitrust cases. Petitioners hope to "wave the magic wand of *Poller*" over their deficient facts and faulty legal theories and take this case to a jury. Under Petitioners' standard, there would be no summary judgment in antitrust cases as long as plaintiff had a well-pleaded complaint, a stack of documents, and a hope that something would develop at trial to controvert the undisputed evidence that there was no conspiracy. That simply is not the standard articulated by this Court. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968).

B. Certiorari Is Unnecessary on the Section 1 Claims because There Is an Independent Basis for the Rulings Below Which Petitioners Do Not Challenge Here

Petitioners attempted to demonstrate below the existence of issues of material fact by placing into the record thousands of pages of unorganized, irrelevant and unauthenticated documents. As one of the two bases for summary judgment, the trial court ruled that Petitioners' reliance on this "ersatz evidence" did not properly oppose the motion under Rule 56 of the Federal Rules of Civil Procedure. The Court of Appeals affirmed the District Court judgment on this ground, as well as others. This finding—which Petitioners do not even mention, much less seek to have reviewed—is alone a sufficient reason to deny the writ. Petitioners do not challenge the fact that its papers

opposing the summary judgment "regularly and systematically violate[d] the rules governing responses to motions for summary judgment," and thus failed to raise any issue of material fact. See Petitioners' Appendix B-11.[4]

Both lower court opinions are replete with examples of Petitioners' failure to adequately oppose Respondents' summary judgment motion. This Court is respectfully referred to the Circuit Court Opinion at pp. A-8, A-31-33 of Petitioners' Appendix and the District Court Opinion at pp. B-11-20 of Petitioners' Appendix for a complete explication of Petitioners' abuses of Rule 56 of the Federal Rules of Civil Procedure.

There is no conflict among the decisions of the circuit courts about this ruling; it is the result of a straightforward application of Rule 56 of the Federal Rules of Civil Procedure. Indeed, Petitioners do not suggest that anything the lower courts did here was improper. Respondents respectfully submit that this ruling makes it unnecessary to carry the inquiry on the Petition any further.

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[4]Indeed, one need look no further than the Petition itself to find numerous examples of Petitioners' disregard for important procedural requirements. Supreme Court Rule 20.5 provides that "the failure of a petition to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the petitions requiring consideration will be a sufficient reason for denying his petition." Yet, in their 63-page petition, Petitioners nowhere set forth with brevity and clearness what factors make this controversy worthy of review by the Supreme Court.

C. The "Overall Conspiracy"

1. Petitioners' Alleged "Overall Conspiracy" Is an Ordinary Conspiracy Claim Which Is Fact Specific and as to Which There Is No Conflict among Decisions

Unable to marshall direct evidence of an "overall conspiracy", in the district court Petitioners relied exclusively on the doctrine of conscious parallelism to raise an issue of material fact.[5]

There is no conflict as to the principles of conscious parallelism that control this case, and Petitioners do not suggest (much less demonstrate) that there is.[6]

Petitioners' conscious parallelism proof did not fail below because the wrong standard was applied or because there is a conflict among circuit court decisions. On the contrary, Petitioners' claim failed below because, on the basis of the undisputed facts (and drawing all inferences most favorable to Petitioners) they raised no genuine issue of material fact as to the existence of parallel conduct, and further, they raised no genuine issue of material fact as to whether or not the allegedly parallel conduct was

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[5]In the Court of Appeals, Petitioners asserted for the first time that certain trade and credit association meetings are circumstantial evidence of a conspiracy. This new argument is discussed below.

[6]Indeed, in a brief recently submitted to the Court, the Solicitor General has articulated the requisites for the doctrine in a manner perfectly consistent with the standard applied by the Ninth Circuit in this matter. *See* Brief for the United States as Amicus Curiae, *Weyerhaeuser Company and Willamette Industries, Inc., Petitioners v. Lyman Lamb Company, et al.*, and *Georgia-Pacific Corporation, Petitioner v. Lyman Lamb Company, et al.*, Nos. 81-1618 and 81-1619, at pages 4, 6-11.

contrary to the economic self-interest of each defendant acting alone.

Petitioners do not—and cannot—assert that this is not the correct standard or that there is a conflict in the circuits regarding this standard. Petitioners' argument simply comes down to this: they believe that the Ninth Circuit did not see in the facts the conclusions Petitioners wanted drawn. Petitioners' disagreement with the Ninth Circuit as to what the facts mean does not in any way necessitate review by this Court.[7]

2. Trade Association Meetings

In the Ninth Circuit, Petitioners urged for the first time that Respondents' participation in trade association meetings and credit managers meetings (at which historical credit information was sometimes exchanged) demonstrates the existence of a conspiracy. Here, again, the issue raised by Petitioners is not the legal standard—in which Petitioners apparently concur—but whether or not the facts support the rulings of the courts below.

The Circuit Court applied the Court's rule from *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 575 (1925): absent any indication of agreement or consent to an illegal arrangement, evidence of industry meetings is not sufficient to prove a conspiracy. Petitioners do not challenge this standard, or claim that it conflicts with the standard applied by any other circuit.

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[7]Respondents submit, of course, that both the District Court and the Ninth Circuit Court articulated and correctly applied the appropriate standard. Both the courts below concluded that the undisputed facts showed an absence of conduct sufficiently similar even to apply the doctrine of conscious parallelism, and, even if the doctrine were applied, the undisputed facts showed that the actions were in the independent economic interest of each defendant.

The Circuit Court found that even when all inferences are drawn in Petitioners' favor, there simply was no genuine issue of material fact—indeed, Petitioners offered no evidence whatsoever—that Respondents exchanged price information (as happened in *United States v. Container Corp.*, 393 U.S. 333, 335 (1969)), or that any Respondent went beyond the bounds of propriety in exchanging credit information for the individual use of each member of the credit managers association in determining whether to grant credit. *See Cement Manufacturers Protective Association v. United States*, 268 U.S. 588 (1925).

3. Neither Of the Opinions Below Is In Conflict With United States v. Paramount

Petitioners' claim that the holding in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) allows them to proceed to trial under a number of "alternative theories", each of which (at least as to Respondents) is merely a variation on the "overall conspiracy" or "vertical" conspiracy theories. However, there is no conflict in any respect between either of the opinions below and *United States v. Paramount Pictures, Inc.*[8] Indeed, both courts below were fully cognizant of that case and were guided by its principles where appropriate.

Unable to articulate a coherent description of the overall conspiracy (*e.g.*, when or how it began, how it operated, what acts constitute it) or a plausible rationale for its existence, Petitioners point to the alleged result—discrimination—and urge that it must result from conspiracy.

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[8]In fact, Petitioners never expressly state how they believe the opinions below conflict with *Paramount*.

This, Petitioners claim, is the result mandated by *United States v. Paramount Pictures, Inc.*

Petitioners could hardly be more incorrect. Here, unlike the situation in *Paramount,* none of the Respondents had any financial interest whatsoever in any retail store, and had no motive to enter into such a conspiracy; there was no genuine issue of fact about those matters. There is no evidence that any alleged co-conspirators retailer pressured any of the Respondents to deal in any particular way with Petitioners. More importantly, there is no evidence or claim here of either retail price maintenance or wholesale price fixing among distributors, such as there was in *Paramount.*[9]

D. Petitioners' Alleged "Vertical" Conspiracy

The courts below dismissed Petitioners' vertical conspiracy claims on the following two separate grounds:

1. Vertical agreements—even discriminatory ones that would ordinarily form the basis for a secondary-line Robinson-Patman case—do not give rise to a Section 1 claim *absent proof of an agreement to exclude others from the buyer's market. See e.g., National Tire Wholesale, Inc. v. Washington Post Co.,* 441 F. Supp. 81 (D.D.C. 1977), *aff'd,* 595 F.2d 888 (D.C. Cir. 1979); *Rutledge v. Electric Hose & Rubber Co.,* 327 F. Supp. 1267 (C.D. Cal. 1971), *aff'd,* 511 F.2d 668 (9th Cir. 1975); *Giguere's Supermarkets, Inc. v. Hannaford Bros. Co.,* 1983 Trade Reg. Rep.

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[9]Presumably, Petitioner is not asserting that *Paramount* in any way bolsters its conscious parallelism proof, since *Paramount* is not a conscious parallelism case.

(C.C.H.) ¶ 65,243 (D. Ma. 1983).[10] There is no conflict among the circuits on this proposition. After reviewing the undisputed facts, and drawing all reasonable inferences in Petitioners' favor, both lower courts concluded that there was no basis for Petitioners' claim here.

2. Even if Petitioner proved a vertical agreement with an exclusionary effect, the arrangement would be judged by the rule of reason. Again, there is no conflict among the circuits as to this rule. *See, e.g., Martin B. Glauser Dodge v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36 (1977). The courts below held that Petitioners could never have put on sufficient evidence to prove an unreasonable restraint of trade.[11] In fact, as the Ninth Circuit points out, the alleged price discrimination Petitioner complains of actually stimulated and enhanced competition in Petitioners' market. See Petitioners' Appendix A-45-47.

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[10]It is axiomatic that the protections of the Robinson-Patman Act would be wholly unnecessary if the Sherman Act reached simple discrimination claims such as Petitioners assert. This is clearly confirmed by the legislative history of the Robinson-Patman Act. (S. Rep. No. 698, 63d Cong., 2d Sess. at 2.); House Debate, 63d Cong., 2d Sess., May 25, 1914, at 9200, reprinted in 2 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, 1325 (1978). *See also Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 63 (1953).

[11]Indeed, the District Court indicated that the record contained examples of competitive pricing, and that Petitioner "would have [the Court] construe the Sherman Act in a way that would interfere with the essence of trade and competition." Petitioners' Appendix B-33.

Either of these reasons is alone sufficient for the lower court rulings, and neither requires review by the Court, for the underlying legal principle is uncontroverted. Petitioner simply wants one more chance to have the alleged facts reviewed.

Nor does *Paramount* conflict with the rulings below that the vertical relations between one distributor and one retailer—even if such relations discriminate against Petitioner—are not *per se* violations of the Act.

In *Paramount*, the Court faced a myriad of horizontal and vertical restraints, including horizontal conspiracies to fix prices, to agree not to compete in numerous respects, and to employ unlawful tying arrangements. Significantly, the horizontal price fixing agreement was found to exist between all the defendants, which included businesses at every level in the chain of distribution. In addition, the Court found vertical agreements between distributors and exhibitors which included price fixing and unlawful tying arrangements.

Some of the producers, exhibitors, and distributors in *Paramount* were financially interdependent businesses. The discriminatory contracts found unlawful in *Paramount* directly benefited the favored exhibitors and their affiliates at all levels in the chain of distribution. This is in sharp contrast to the absence of ownership of retail stores by any Respondent. No Respondent has any retail outlets, and the same is true for each of the other distributor defendants, except Columbia, which had a single retail operation until 1976.

Only as a part of this massive scheme in *Paramount* did the Court find that some of the vertical contracts between

distributors and exhibitors, which themselves covered a wide range of practices, violated Section 1. The discriminations condemned in *Paramount* were part and parcel of a larger price fixing arrangement, but there is no evidence in this case of the pervasive horizontal and vertical price fixing which was so evident in *Paramount*. There, in the context of the broad range of illegal conduct, many types of otherwise non-violative business practices could form the basis for remedial orders. Yet it is impossible to see how that fact lends any credibility to Petitioners' arguments here.

IV

CONCLUSION

For the foregoing reasons this Court should decline to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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